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Supreme Court, U.S.
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In The

Supreme Court of the United States

CARL BURNETT,

Petitioner,

v.

GENERAL MOTORS CORPORATION, SELF-INSURED, and SECOND INJURY FUND/PERMANENT AND TOTAL DISABILITY PROVISION,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Michigan

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was Carl Burnett denied Due Process under the Fourteenth Amendment when a Michigan Worker's Compensation Magistrate forced him to represent himself at an administrative trial, after Mr. Burnett's attorney had been disbarred, knowing that Carl Burnett was mentally ill and that his schizophrenia prevented him from understanding the proceedings?

2. Did Carl Burnett receive equal protection under the Fourteenth Amendment when he was denied counsel and forced to represent himself, despite the fact that he was mentally ill and incapable of understanding the proceedings, in front of a Michigan Worker's Compensation Magistrate because his injuries did not result from an intentional tort, whereas he would not have even been allowed to represent himself and would have had an attorney in a Michigan Court if he had suffered the same injury as a result of an intentional tort?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the Michigan Supreme Court.

The Petitioner here and appellant below is Carl Burnett.

The Respondents here and appellees below are General Motors Corporation and Second Injury Fund/ Permanent and Total Disability Provision.

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The opinion of the Michigan Supreme Court denying Petitioner's Application for Leave to Appeal is reported at 483 Mich. 896, 760 N.W.2d 499 (2009) [App at 1]. The order of the Michigan Supreme Court denying Petitioner's Motion for Reconsideration on his Application for Leave to Appeal is reported at 483 Mich. 982, 764 N.W.2d 246 (2009) [App at 13]. The decision of the Michigan Court of Appeals is unreported [App at 3].

STATEMENT OF JURISDICTION

The Michigan Supreme Court originally denied Petitioner's Application for leave to appeal on February 24, 2009. The Michigan Supreme Court denied Petitioner's Motion for Reconsideration on April 28, 2009. This Court has jurisdiction under 28 U.S.C. §1257(a).

STATUTES AND REGULATIONS INVOLVED

The Petitioner, Carl Burnett, filed the underlying claim for worker's compensation benefits pursuant to MCL §418.131(1) which states that:

> Sec. 131. (1) The right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational

> disease. The only exception to this exclusive remedy is an intentional tort.

The Petitioner's due process rights were violated when he was forced to represent himself despite the fact that he was mentally ill and did not understand the proceedings, the relevant part of the Fourteenth Amendment read as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Petitioner's equal protection rights were violated under the Fourteenth Amendment when he was not afforded the same right to counsel in the administrative proceeding as he would have received in a civil court under the Mich. Const. Art. 1, §13, "A suitor in any court of this state has the right to prosecute or defend his suit, either in his own proper person or by an attorney." Similarly, Michigan law mandates that "[e]very person of full age and sound mind, may prosecute or defend civil actions in any court by an attorney, or may, at his election, prosecute or defend civil actions in person." MCL §600.1430.

STATEMENT OF THE CASE

Carl Burnett worked as an iron pourer at General Motors for over 22 years beginning in 1972. Mr. Burnett suffered an injury to his back while at work in 1979 while picking up sandbags in the course of his employment. The back injury was aggravated in 1981 when Mr. Burnett attempted to return to work and Mr. Burnett suffered further injury to his legs while he was attempting to lift a motor. After seeing a doctor in 1982 relating to surgery on his legs and back, Mr. Burnett was referred to a doctor specializing in mental health and was diagnosed with schizophrenia.

Carl Burnett filed a claim with the Michigan Worker's Compensation Agency on November 7, 2005, seeking benefits for a total and permanent disability due to his back pain and mental illness [App at 5]. Mr. Burnett relied on the receipt of these benefits to support himself, as he was no longer able to obtain employment due to his physical and mental disabilities. In filing the initial petition, Mr. Burnett was represented by an attorney named John Zorza, II. Mr. Zorza informed Mr. Burnett that he was retiring in December of 2006 and informed the Worker's Compensation Magistrate that he would no longer be representing Mr. Burnett [App at 28]. In reality, it appears that Mr. Zorza's license to practice law was revoked [App at 22-23]. After Mr. Zorza "retired" when his license was revoked on May 4, 2007, Mr. Burnett was unable to find counsel for his trial date of June 13, 2007 [App at 28].

On June 13, 2007 Carl Burnett showed up for trial without an attorney. Mr. Burnett had contacted several other attorneys from December of 2006 until his trial date, however, none of them were willing to take his case due to lack of time to prepare and an unwillingness to travel [App at 28]. Mr. Burnett went to great lengths to find an attorney but was unsuccessful. Specifically, he had to "catch a bus" from Detroit, MI to Saginaw, MI, a distance of over 100 miles, in his attempt to find a local attorney to take his case [App at 28]. Prior to the trial the magistrate asked Mr. Burnett if he was ready to proceed, and Mr. Burnett stated:

> Mr. Burnett: Judge, I'm not ready to proceed because I didn't have a high school education and I need time. I am being forced to take this case . . . I cannot represent myself in this case. I'm asking the Court for more time to get me an attorney so I can get the doctor's depositions and to represent me. That's – this is a misjustice because they are skilled and trained, trained – they got a high school education. [App at 27].

Mr. Burnett then requested more time, and the magistrate indicated that he would not adjourn the matter [App at 30]. Mr. Burnett further stated that:

> Mr. Burnett: – can I put in my objection and say I object to the Court not giving me time up under the Constitutional Right it says a man has the right to have a counsel.

> Magistrate Purcell: No he doesn't have the right to counsel in this – he has a right if you can find a lawyer to take your case. [App at 30].

Mr. Burnett further made the magistrate aware that he suffered from schizophrenia, specifically:

> Mr. Burnett: Well here's my case and here it is I want to give you papers saying that I'm total and permanent physical and mentally, here it is and my doctor say that I am a Schizophrenic; Schizophrenic is total and permanent.
>
> Magistrate Purcell: I don't know that. There is not evidence in the file to tell me that. You have the burden of proof to establish your claim. [App at 43].

In order to establish his mental illness, Mr. Burnett brought a letter from his Doctor, Dr. Rao [App at 71] and previous administrative order [App at 72-73], however Mr. Burnett was unable to admit these documents or present this evidence [App at 34-35]. On June 13, 2007, Mr. Burnett's claims were denied by Magistrate Purcell. Specifically, the opinion states:

> At the time of trial on June 13, 2007, Plaintiff attempted to present evidence which was objected to. The objections were sustained inasmuch as the evidence was improperly presented.
>
> Plaintiff has a burden of proof to establish all elements of his claim. He failed to

> present any admissible evidence to substantiate his entitlement to total and permanent disability benefits for either mental disability or industrial loss of use of his lower extremities. In view of the lack of evidence, his claim must be denied. [App at 17].

The State of Michigan Worker's Compensation Appellate Commission denied Mr. Burnett's appeal claiming that he could have merely withdrawn his case, a remedy which hardly provided Mr. Burnett an opportunity to be heard at a meaningful time and in a meaningful manner [App at 10]. The Michigan Court of Appeals [App at 3] and the Michigan Supreme Court [App at 20] declined to hear Mr. Burnett's appeal, forcing him to appeal to the United States Supreme Court.

REASONS FOR GRANTING THE PETITION

This case represents an extremely important question of constitutional law that has not yet been decided, namely whether due process demands that a mentally ill man with a ninth grade education be forced to represent himself against his will in the context of a civil proceeding in order to obtain worker's compensation benefits. *See* Sup. Ct. R. 10(c). Moreover, given that the West Virginia Supreme Court recognizes a right to counsel in a worker's compensation hearing, the rulings of the Michigan Supreme Court are in direct conflict with the supreme court of another state and the discrepancy must be

resolved by the Court. *See Marcus v. Holley*, 618 S.E.2d 517, 536 (W.Va. 2005)[1]. The Court should grant this petition as the Michigan Supreme Court conflicts with the West Virginia Supreme Court which recognizes a right to counsel in a worker's compensation hearing under the Due Process Clause.

Similarly, this case represents a matter of national importance as many states have created a worker's compensation agency by statute, which is part of the executive branch of government as opposed to the judicial branch. Despite being part of the executive branch, claimants are required to make a presentation in a substantially similar manner as would be the case in a court, yet are not afforded the same rights. Specifically, in the instant case, the Court is called upon to determine whether there is a rational basis for providing a mentally ill claimant the right to counsel because he was intentionally injured, as opposed to denying such a right to a similarly situated person who is forced to proceed without counsel in an executive hearing merely

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[1] *See Marcus v. Holley*, 618 S.E.2d 517, 536 (W.Va. 2005) ("Procedural due process rights entitle an individual to representation by counsel, notice, an opportunity to be heard, and the right to present evidence. *See generally Barazi v. West Virginia State College*, 201 W.Va. 527, 498 S.E.2d 720 (1997); *North v. West Virginia Bd. of Regents*, 160 W.Va. 248, 233 S.E.2d 411 (1977). The record clearly reveals that Ms. Marcus' case proceeded through the worker's compensation system without undue delay, and she received a permanent disability award. Ms. Marcus possessed the right to counsel and received notice and opportunity to be heard at all hearings and proceedings.").

because his injury did not result from an intentional tort. As such, if the Court does not take this case, many mentally ill individuals such as Carl Burnett will continue to have their due process rights trampled based upon an irrational distinction, namely the manner in which they were injured.

I. CARL BURNETT'S DUE PROCESS RIGHTS WERE VIOLATED WHEN A MICHIGAN WORKER'S COMPENSATION MAGISTRATE FORCED CARL BURNETT TO REPRESENT HIMSELF AT TRIAL AFTER HE REQUESTED COUNSEL BECAUSE HE WAS A SCHIZOPHRENIC INCAPABLE OF UNDERSTANDING THE PROCEEDINGS AND THE MAGISTRATE FAILED TO ADJOURN THE HEARING OR PROVIDE HIM WITH COUNSEL.

Carl Burnett's due process rights were violated when he was forced to represent himself at his worker's compensation trial despite the fact that he was a schizophrenic with a 9th grade education and was incapable of understanding the proceedings.

The Constitution states that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." 14th Amendment, §1.

In performing a due process analysis, it is first necessary to determine whether the plaintiff has a protected property or liberty interest. Specifically, the "applicability of the constitutional guarantee of procedural due process depends in the first instance on the presence of a legitimate 'property' or 'liberty' interest within the meaning of the Fifth or Fourteenth Amendment." *Arnett v. Kennedy*, 416 U.S. 134, 164 (1974). In interpreting the due process clause, the Supreme Court has "held that a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). As such, Carl Burnett has a protected property interest in his Worker's Compensation Claim which is a cause of action.

Given that Carl Burnett has a protected property interest, it should be noted that the fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Moreover, "the Fourteenth Amendment's Due Process Clause has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be 'the equivalent of denying them an opportunity to be heard upon their claimed right[s].'" *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971).

In the context of civil proceedings, the Constitution mandates that Carl Burnett be afforded a fair hearing and opportunity to be heard after taking into

account that he suffers from schizophrenia. Specifically, in the context of an SSI claim, which is similar to a worker's compensation claim for disability benefits, the federal courts have noted,

> [A] due process claim seems peculiarly apropos in the context of Social Security disability benefit proceedings in which, as here, the very disability that forms all or part of the basis for which the claimant seeks benefits may deprive her of the ability to understand or *act upon* notice of available administrative procedures.

Byam v. Barnhart, 336 F.3d 172, 181 (2nd Cir. 2003). Moreover,

> . . . an SSI claimant suffering from mental illness may raise ***a colorable due process claim when he asserts that his mental illness prevented him from proceeding***. . . .

Canales v. Sullivan, 936 F.2d 755, 758 (2nd Cir. 1991).

Similarly, as recognized by the Sixth Circuit,

> . . . while ***the commencement of a civil case does not suspend the Due Process Clause***, it does alter the fairness requirements of the Clause. Whereas due process protects incompetent criminal defendants by imposing an outright prohibition on trial, ***it protects incompetent civil parties by requiring the court to appoint guardians to protect their interests*** and by

> judicially ensuring that the guardians protect those interests.

U.S. v. Mandycz, 447 F.3d 951, 962 (6th Cir. 2006). *See also Covey v. Town of Somers*, 351 U.S. 141, 146-147 (1956) ("Notice to a person known to be an incompetent who is without the protection of a guardian does not measure up to this requirement.").

In the instant case, Carl Burnett had retained counsel to file his claim for worker's compensation benefits as he was unable to represent himself due to his mental illness. Mr. Burnett's claim was filed in November of 2005 [App at 5] and he was abandoned by his attorney, John Zorza, II, in December of 2006 [App at 28], as Mr. Zorza's was preparing to have his license to practice law revoked. Specifically, Mr. Zorza was disbarred on May 4, 2007 [App at 22-23].

Despite being mentally ill, having a ninth grade education, and only having minimal time to prepare, Mr. Burnett made diligent attempts to find a new lawyer [App at 28]. In fact he went to extraordinary lengths traveling by bus over 100 miles from Detroit to Saginaw [App at 28]. While many lawyers in Detroit told Mr. Burnett that he had a case, he could not find one willing to take the case due to lack of time to prepare and the amount of travel involved [App at 28]. At the date set for trial, Mr. Burnett objected to the magistrate proceeding:

> Mr. Burnett: Judge, I'm not ready to proceed . . . I am being forced to take this case . . . I cannot represent myself in this

> case. I'm asking the Court for more time to get me an attorney so I can get the doctor's depositions and to represent me. [App at 27].
>
> Mr. Burnett: They trained and I mean I don't have a high school education. I don't understand certain things that's going on here. [App at 27].

Prior to the beginning of the hearing, Mr. Burnett requested more time and the magistrate indicated that he would not adjourn the matter [App at 30]. Mr. Burnett further stated that:

> Mr. Burnett: – can I put in my objection and say I object to the Court not giving me time up under the Constitutional Right it says a man has the right to have a counsel.
>
> Magistrate Purcell: No he doesn't have the right to counsel in this – he has a right if you can find a lawyer to take your case. [App at 30].

Mr. Burnett further made the magistrate aware that he suffered from schizophrenia, specifically:

> Mr. Burnett: Well here's my case and here it is I want to give you papers saying that I'm total and permanent physical and mentally, here it is and my doctor say that I am a Schizophrenic; Schizophrenic is total and permanent. [App at 43].

In addition, Mr. Burnett provided the magistrate a doctor's note [App at 71] and social security administration opinion [App at 18] confirming his

mental illness. Despite Mr. Burnett's numerous objections to proceeding, the magistrate forced Mr. Burnett to proceed without counsel. The result was that Mr. Burnett's claim was denied as he was incapable of understanding how to present a case and the objections to his presentation were sustained [App at 32, 34, 37-38, 40, 43].

Mr. Burnett was denied due process as he never had an opportunity to present his claim in a meaningful manner. The magistrate asking Mr. Burnett to proceed on his own, and attempting to provide him instruction to do so, was the equivalent of asking a blind man to read him the newspaper. In short, it is fundamentally unfair to require a mentally ill person that lacks a high school education to proceed without any assistance, against their will, and to be required to present evidence and prove their case in the same manner as a skilled attorney.

Moreover, Mr. Burnett's case presents the ultimate Catch 22. Specifically, one of Mr. Burnett's main objectives at trial was to demonstrate that he was so mentally incompetent that he was unable to work. However, if Mr. Burnett were able to prove his total and permanent mental disability on his own, it may have demonstrated that he was capable of working, and in effect making this showing by himself would cost him his claim for benefits. As such, it was not possible for Mr. Burnett to have a fair hearing after he was forced to represent himself.

Finally, it should be noted that there were at least three separate and distinct choices that Magistrate Purcell could have made to afford Mr. Burnett due process. First, Magistrate Purcell could have adjourned the hearing to afford Mr. Burnett more time to hire counsel given Mr. Burnett's mental illness and extraordinary attempts to hire counsel. Second, Magistrate Purcell could have appointed a guardian or guardian ad litem to assist Mr. Burnett with his case and/or assisting him in finding an attorney. *See U.S. v. Mandycz*, 447 F.3d 951, 962 (6th Cir. 2006). Third, Magistrate Purcell could have at the very least had a hearing to determine whether Mr. Burnett was competent to proceed, before requiring him to do so. As such, this Court should reverse the rulings of the Michigan Supreme Court and Michigan Worker's Compensation Agency and require them to perform at least one of the above listed steps to ensure that Mr. Burnett receives a fair hearing. This is not only necessary to redress the grievous wrong suffered by Mr. Burnett, but such a decision would also create uniformity amongst the administration of state worker's compensation agencies and require them to provide the same safeguards for mentally ill claimants that the federal courts already require.

II. CARL BURNETT HAS BEEN DENIED EQUAL PROTECTION UNDER THE LAWS OF THE STATE OF MICHIGAN AS HE WAS MENTALLY ILL AND FORCED TO CONDUCT A TRIAL WITHOUT AN ATTORNEY IN FRONT OF A WORKER'S COMPENSATION MAGISTRATE WHEN HE WOULD NOT HAVE BEEN REQUIRED TO DO THE SAME IN FRONT OF A MICHIGAN COURT.

Carl Burnett was denied equal protection under Michigan law when the worker's compensation magistrate forced him to represent himself at trial when he would not have been required to do so in a civil case if he had been intentionally injured as opposed to accidentally injured.

The Fourteenth Amendment states in pertinent part that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." 14th Amendment, §1.

In interpreting the Fourteenth Amendment, the Court has previously stated that,

> . . . [t]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express

> terms of a statute or by its improper execution through duly constituted agents.

Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000). Moreover,

> . . . the Fourteenth Amendment "requires that all persons subjected to . . . legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." *Hayes v. Missouri,* 120 U.S. 68, 71-72, 7 S.Ct. 350, 30 L.Ed. 578 (1887). When those who appear similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference, to assure that all persons subject to legislation or regulation are indeed being "treated alike, under like circumstances and conditions."

Enquist v. Oregon Dept. of Agr., 128 S.Ct. 2146, 2153 (2008).

In the specific context of discrimination against those with mental disabilities, the Court has stated that:

> In *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985), we considered an equal protection challenge to a city ordinance requiring a special use permit for the operation of a group home for the mentally retarded. The specific question before us was whether the Court of Appeals had erred by holding that

> mental retardation qualified as a "quasi-suspect" classification under our equal protection jurisprudence. *Id.*, at 435, 105 S.Ct. 3249. We answered that question in the affirmative, concluding instead that such legislation incurs only the minimum "rational-basis" review applicable to general social and economic legislation. *Id.*, at 446, 105 S.Ct. 3249.

Board of Trustees of University of Alabama v. Garrett, 531 U.S. 356, 366 (2001). As such, the State of Michigan must have a rational basis for enacting laws which require a mentally incompetent schizophrenic to represent himself at a worker's compensation hearing when it would not be allowed in a court.

Specifically, the State of Michigan has chosen to create the Bureau of Worker's Compensation, which is part of the Michigan Department of Labor and the executive branch of Michigan Government. *See* MCL §418.201. The Bureau is responsible for hearing contested cases when an employee makes a claim for benefits under the Michigan Worker's Compensation Act. *See* MCL §418.847. Michigan law provides a claim for benefits,

> . . . shall be the employee's ***exclusive remedy*** against the employer for a personal injury or occupational disease. The ***only exception to this exclusive remedy is an intentional tort***. . . . The issue of whether an act was an intentional tort shall be a question of law for the court.

MCL §418.131(1).

As such, claimants that suffer a disability as a result of an intentional tort are allowed access to the Michigan Courts, whereas claimants who suffer a disability from an unintentional tort or otherwise are required to proceed in front of a Bureau magistrate.[2] Within the context of these intentionally and unintentionally injured employees there is a subclass of employees that are seeking redress for injuries due to mental disability. *See* MCL §418.301. Often times those seeking redress for mental disability, such as Carl Burnett, do not possess the mental competence to represent themselves in front of a court or worker's compensation magistrate. However, whether someone like Mr. Burnett can obtain counsel to represent himself is dependent upon a completely irrational distinction, specifically, whether one is fortunate enough to suffer an intentional injury as opposed to an unintentional injury, therefore triggering the right to counsel.

MCL §418.131(1) intentionally allows those who are mentally disabled, but have suffered an intentional injury, access to the courts. This is extremely

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[2] *See Harris v. Vernier*, 617 N.W.2d 764, 768-769 (Mich.App. 2000) ("As previously stated, the exclusive remedy provision limits an employee's right to recover against his employer or a coemployee for a personal injury arising out of the course of his employment to the benefits available under the WDCA. MCL §418.131; MSA 17.237(131), MCL §418.301; MSA 17.237(301). Significantly, MCL §418.841(1); MSA 17.237(841)(1) confers exclusive jurisdiction of claims under the WDCA on the Bureau of Worker's Compensation.").

important, as it affords the mentally disabled that were intentionally injured a right to representation, that is not afforded to the mentally disabled that were unintentionally injured. Specifically, the Michigan Constitution provides that a "suitor in any court of this state has the right to prosecute or defend his suit, either in his own proper person or by an attorney." Mich. Const. Art. 1, §13. Moreover, the Michigan Revised Judicature Act, which governs the conduct of proceedings in Michigan courts, states that "[e]very person of full age and sound mind, may prosecute or defend civil actions in any court by an attorney, or may, at his election, prosecute or defend civil actions in person." MCL §600.1430. As such, if a Court determined that Mr. Burnett was not of "sound mind" due to his schizophrenia, he would not have been allowed to represent himself under MCL §600.1430.[3]

In contrast, mentally disabled claimants that suffer an unintentional injury do not receive the same protections as the right to an attorney under Mich. Const. Art. 1, §13, and the requirement of competency to proceed in *pro per* under MCL §600.1430 are inapplicable to a worker's compensation hearing by their own terms as they only apply to court cases and not a

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[3] MCR 2.201(B)(1) states that "A personal representative, guardian, conservator . . . may sue in his or her own name without joining the party for whose benefit the action is brought." As such, if Mr. Burnett would not have been able to proceed under MCL §600.1430 in Court, the procedure would have been to appoint a guardian to prosecute the action for his benefit.

hearing conducted by the executive branch of government. In fact the only protection purportedly afforded to Mr. Burnett under the Michigan Constitution is as follows in an executive administrative hearing:

> No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed.

Mich. Const. Art. 1, §17. However, given that Mr. Burnett was denied the right to counsel that would be afforded to someone that was mentally disabled who suffered intentional injuries, it can hardly be said that violating his equal protection rights under the federal constitution afforded him "fair and just treatment."

Finally, it should be noted that there is no rational reason for affording one who is intentionally injured and suffers a mental disability affecting their competence, different rights than someone who has been accidentally injured and suffers a mental disability. The manner in which one is injured has absolutely no relation to his ability to represent themselves in a complex legal matter. Similar to the Michigan Rules of Evidence in a court proceeding, there are certain rules that are required to be followed in a worker's compensation hearing necessitating the need for a lawyer.

Specifically, the Michigan Worker's Compensation Act provides that,

> The rules of evidence as applied in a nonjury civil case in circuit court shall be followed as far as practicable, but a magistrate may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs. Depositions shall not be allowed to be used as evidence. Medical reports may be used as evidence.

MCL §418.841(6).

Moreover, the worker's compensation hearings have their own special rules, in addition to the normal rules. In the instant case, Mr. Burnett's claim was ultimately denied as he was unable to comprehend Michigan Worker's Compensation Agency Rule 418.55, which requires that any exhibits be produced 42 days prior to trial. If Mr. Burnett would had the right to a lawyer and/or not been allowed to proceed due to his mental disability, which prevented him from prosecuting this matter, he certainly would have been able to admit the medical reports [App at 72-74] that were not allowed into evidence at the hearing [App at 32, 34, 37-38, 40, 43]. As such, given that the worker's compensation hearing has its own special technical rules, that a mentally disabled schizophrenic would have been incapable of understanding, it cannot be said that there is any rational

basis for not providing Mr. Burnett the same rights as a civil litigant in a Michigan court.

CONCLUSION AND RELIEF REQUESTED

Because this case presents important issues of constitutional law regarding the Fourteenth Amendment rights of mentally ill civil litigants, the petition for a writ of certiorari should be granted.

Respectfully submitted,

PENZIEN HIRZEL, PLLC

By: CHARLES M. PENZIEN
Counsel for Petitioner
17001 19 Mile Road Suite 1-B
Clinton Township, MI 48038
(586) 464-1900

Order

Michigan Supreme Court
Lansing, Michigan

February 24, 2009

Marilyn Kelly,
Chief Justice

137780

Michael F. Cavanagh
Elizabeth A. Weaver
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman
Diane M. Hathaway,
Justices

CARL BURNETT,

Plaintiff-Appellant,

v

GENERAL MOTORS CORPORATION, SELF-INSURED, and SECOND INJURY FUND/PERMANENT AND TOTAL DISABILITY PROVISION,

Defendants-Appellees.

SC: 137780
COA: 288091
WCAC: 07-000153

/

On order of the Court, the application for leave to appeal the October 22, 2008 order of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

[SEAL] I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a

true and complete copy of the order entered at the direction of the Court.

February 24, 2009 /s/ Corbin R. Davis
Clerk

IN THE MICHIGAN COURT OF APPEALS

ORDER

Re: **Carl Burnett v General Motors Corporation**
Docket No. **288091**
L.C. No. **07-000153**

Christopher M. Murray, Chief Judge Pro Tem, acting under MCR 7.203(F)(1) and 7.216(A)(10), orders:

The claim of appeal is DISMISSED for lack of jurisdiction because the order from the Worker's Compensation Appellate Commission is not appealable as a matter of right. See MCL 418.861(a).

[SEAL] A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

OCT 22 2008 /s/ Sandra Schultz Mengel
Date Chief Clerk

2008 ACO # 193

STATE OF MICHIGAN
WORKERS' COMPENSATION
APPELLATE COMMISSION

CARL BURNETT,

PLAINTIFF,

V

GENRAL MOTORS CORPORATION, SELF-INSURED; SECOND INJURY FUND/PERMANENT AND TOTAL DISABILITY PROVISION,

DEFENDANTS.

DOCKET #07-0153

APPEAL FROM MAGISTRATE PURCELL.

JAMES E. EDOKPOLO FOR PLAINTIFF,
EMIL L. OGNISANTI FOR DEFENDANT GENERAL MOTORS CORPORATION, SELF INSURED,
ANDREW J. LEMKE FOR DEFENDANT SECOND INJURY FUND/PERMANENT AND TOTAL DISABILITY PROVISION

OPINION

GRIT, COMMISSIONER

Plaintiff appeals a denial of total and permanent disability benefits. The plaintiff represented himself

at trial. On appeal (now represented by counsel) the plaintiff alleges the magistrate violated his due process rights by proceeding to trial. The plaintiff also alleges evidence that was not admitted at trial would have established total and permanent disability.

This appeal presents legal challenges to the magistrate's decision. We review issues of law de novo. *Mudel v Great Atlantic & Pacific Tea Company,* 462 Mich 691 (2000).

We affirm.

Case Summary

In 1999, Mr. Burnett received an open award of benefits for a low back injury that occurred on October 15, 1979. That opinion was never appealed and benefits are still being paid. The original petition did not allege total and permanent disability.

In January 2001, the plaintiff filed a petition seeking total and permanent disability benefits. That petition was withdrawn in May of 2001. The WCAC denied a motion to reinstate the petition and denied a motion to reconsider. That decision was appealed and the Michigan Supreme Court denied leave on September 30, 2002.

The plaintiff filed the current petition on November 7, 2005, alleging permanent and total disability. He alleged radiculopathy in both legs required him to

use a cane, resulting in the industrial loss of use of both legs. He also alleged he had a mental illness.

The case was tried June 13, 2007, more than 19 months after the petition was filed. The plaintiff tried, but was unsuccessful in hiring an attorney to represent him in his request for total and permanent disability benefits.

On June 13, 2007, the plaintiff asked for an adjournment to allow him time to find an attorney to represent him. The magistrate denied the request, pointing out that he had granted the plaintiff a number of adjournments, had recommended the plaintiff hire an attorney and had even gone so far as to provide the plaintiff with copies of case law on the subject of permanent and total disability and advise him on what type of evidence needed to be submitted at trial. The magistrate summarized the procedural background as follows:

> MAGISTRATE PURCELL: Thank you. Mr. Burnett has indicated he is here representing himself. And we've had a number of discussions, I have, with Mr. Burnett as to the fact that it is a difficult claim to establish; that his claim is a difficult claim to establish and that it would be beneficial if he had a lawyer. Of course he can represent himself. This case has been set for Trial five times and initially back in November and December I gave Mr. Burnett additional time to either find a lawyer and take medical testimony or do something. I

> then moved it to a control date in February to give Mr. Burnett time to get representation or – or to get something – to do something. We then moved it to March 7, again saying that he's just got to do something. I then moved it to April 11 as an absolutely last trial date. Mr. Burnett and I discussed it at that time and I said that he's just got to do something, talk to people and find out what he wants to do, either represent himself or whatever. At that time, I believe that was the time I gave him some case law, copies of decisions concerning the nature of his claim and what he had to prove. And I told him that he would need testimony from his physician or we could use medical records, which he could introduce under the provisions of the Act and Rules. [Trial transcript, pp 3-4.]

Mr. Burnett initially denied he was ready to proceed to trial. [Trial transcript, pp 4-5.] However, when the magistrate denied his request for another adjournment, he agreed he wanted to proceed.

> MAGISTRATE PURCELL: Well Mr. Burnett I've bent over backwards. I really think I have. Either you're ready to proceed today or you're not. Are you ready to proceed?
>
> MR. BURNETT: Will the Court grant me more time?
>
> MAGISTRATE PURCELL: No.

MR. BURNETT: Well I'm ready to proceed.

MAGISTRATE PURCELL: Pardon?

MR. BURNETT: I'm ready to proceed –

MAGISTRATE PURCELL: Okay –

MR. BURNETT: – if the Court refusing me, but can I put in my objection to that?

MAGISTRATE PURCELL: You have. [Trial transcript, p 8.]

The magistrate sustained objections to the plaintiffs proposed exhibits or evidence several times during the trial. The defense attorneys did stipulate to the introduction of one of the exhibits, a December 1998 MRI report. That MRI report established the plaintiff had degenerative disc disease and spinal stenosis. It did not establish the elements of a total and permanent disability claim. [Exhibit #1.] The magistrate denied the claim.

After failing to submit most of his proposed evidence, the plaintiff asked to withdraw his claim. Mr. Burnett then clarified he did not want to withdraw his claim; what he really wanted was another adjournment. [Trial transcript, pp 26-27.]

The magistrate denied the petition. He provided the following analysis.

Plaintiff was given many adjournments so that he could attempt to secure representation. Unfortunately he was unable to find

> representation and was unable to properly present his claim at the time of trial. The Plaintiff requested additional time; I refused his request as he had been given the opportunity on numerous occasions to at least secure counsel or evidence of his entitlement to additional benefits.
>
> At the time of trial on June 13, 2007, Plaintiff attempted to present evidence which was objected to. The objections were sustained inasmuch as the evidence was improperly presented.
>
> Plaintiff has a burden of proof to establish all elements of his claim. He failed to present any admissible evidence to substantiate his entitlement to total and permanent disability benefits for either mental disability or industrial loss of use of his lower extremities. In view of this lack of evidence his claim must be denied. [Magistrate's opinion, p 3.]

The plaintiff filed a timely appeal. The defendants urge us to affirm the denial of permanent and total disability benefits.

Analysis

The plaintiff's first two arguments on appeal involve the magistrate's denial of the requested adjournment. More specifically, the plaintiff argues the magistrate denied the plaintiff's due process rights and otherwise generally erred, by "commencing

trial knowing that the plaintiff was incapable of representing himself."[1]

The plaintiff never explains how he believes the magistrate violated his due process rights. He simply points out that he had a property interest in the outcome of the trial. The only case law cited, *Williams v Hofley Manufacturing Company* 430 Mich 603 (1988), held that the interest designations of previous appeal board members as "employee" and "general public" representatives, did not deprive a defendant of due process. The *Williams* case was focused on the impartiality of the appeal board members. There is no allegation here that the magistrate was not impartial.

The plaintiff argues the magistrate never should have required a claimant with less than a high school education to try a highly technical workers' compensation case. The plaintiff misses the important point; he did not have to try his case. He could have withdrawn his case. He chose not to.

We view the magistrate's refusal to adjourn a trial date under an abuse of discretion standard. In *Maldonado v Ford Motor Company*, 476 Mich 372 (2006), the Michigan Supreme Court discussed the abuse of discretion standard:

> In *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003), this Court noted that

---

[1] Plaintiffs brief pp 2-3.

an abuse of discretion standard must be one that is more deferential than review de novo but less deferential than the standard set forth in *Spalding v Spalding*, 355 Mich 382; 94 NW2d 810 (1959). This Court stated that "**an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome.**" *Babcock, supra* at 269. The *Babcock* Court further noted that "**[w]hen the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus it is proper for the reviewing court to defer to the trial court's judgment.**" *Id.* While *Babcock* dealt with a criminal sentencing issue, we prefer the articulation of the abuse of discretion standard in *Babcock* to the *Spalding* test and, thus, adopt it as the default abuse of discretion standard.

The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an 'abuse' in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias. [*Id.*, pp 384-385, Emphasis added.]

We do not believe the magistrate abused his discretion. The plaintiff's petition was pending for more than a year and half before it went to trial. The magistrate gave the plaintiff adequate time to find an attorney and to prepare his case. The plaintiff essentially argues the magistrate was obligated to give the plaintiff as many adjournments as he requested, until the plaintiff felt he was prepared to go to trial. We disagree. The magistrate exercised reason and selected a principled outcome. That outcome was to set time limits for the presentation of proofs or require the plaintiff to withdraw the case. The plaintiff chose to proceed to trial.

We do not address the plaintiff's argument that if his proofs were submitted he would have established his claim. We do not consider non-record "evidence," only whether that evidence was properly excluded. The plaintiff argues his own testimony was sufficient to establish he was permanently and totally disabled. We disagree. The plaintiff sought to establish he had suffered the industrial loss of use of his legs. The proofs established he had degenerative disc disease and stenosis in his lumbar spine and walked with a cane. Those proofs do not rise to the level of industrial loss of use of the legs. He also sought to establish he suffered from schizophrenia, but he failed to introduce any medical evidence that established that diagnosis, much less its impact on his overall functional ability. MCL 418.361(3).

Conclusion

The magistrate did not err in refusing to adjourn the trial or by proceeding even though the plaintiff was unrepresented. The denial of permanent and total disability benefits is affirmed.

Commissioner Przybylo and Chairperson Glaser concur.

ORDER MAILED

SEP 09 2008
WORKERS'
COMPENSATION
APPELLATE
COMMISSION

/s/ Donna J. Grit
Donna J. Grit Commissioner

/s/ Gregory A. Przybylo
Gregory A. Przybylo Commissioner

/s/ Martha M. Glaser
Martha M. Glaser Chairperson

STATE OF MICHIGAN
DEPARTMENT OF LABOR
& ECONOMIC GROWTH
WORKERS' COMPENSATION AGENCY
BOARD OF MAGISTRATES

Carl Burnett
[Social Security Number Omitted]

Plaintiff,

-v-

General Motors
Corporation, Self-Insured

Defendants, /

APPEARANCES:

Carl Burnett, in-pro-per
E. Louis Ognisanti (P23130), attorney for the Defendant
Lawrence W. Smith, Jr. (P27029), attorney for the SIF/Total and Permanent Disability

TRIAL DATE:

June 13, 2007

OPINION STATEMENT OF CLAIM:

Plaintiff filed an Application for Mediation or Hearing which was received by the Bureau on November 7, 2005. In it he claimed to be totally and permanently disabled under two separate subsections of the Workers'

Compensation Act; the one dealing with mental injury and the one dealing with loss of industrial use of both legs.

STIPULATIONS:

There were no stipulations.

WITNESSES TESTIFYING PERSONALLY:

Plaintiff:

Carl Burnett, Plaintiff

Defendant:

None

WITNESSES TESTIFYING BY DEPOSITION:

Plaintiff:

None

Defendant:

None

EXHIBITS:

Plaintiff:

1. MRI report dated December 30, 1998

Defendant:

None

DISCUSSION

This case has a long history. Magistrate Cynthia Johnson tried the claim and issued a decision dated November 5, 1999 in which she found that Plaintiff suffered an injury during the course of his employment at General Motors on October 15, 1979. In that incident he suffered a herniated disc which resulted in ongoing problems. She entered an open award. During trial the parties agreed that the Plaintiff was paid weekly benefits through May 8, 1998. The opinion further stated that Plaintiff's last date of employment was July 16, 1981. Magistrate Johnson's decision was not appealed.

It appears that another Application for Hearing was filed by attorneys for Plaintiff. This was received by the Bureau on January 12, 2001. That application was ultimately withdrawn by the attorneys and an Order dismissing the application was entered. Plaintiff, in proper person, appealed that Order. The appeal was denied. Plaintiff then filed the present application which was received by the Bureau on November 7, 2005.

Plaintiff was given many adjournments so that he could attempt to secure representation. Unfortunately he was unable to find representation and was unable to properly present his claim at the time of trial. The Plaintiff requested additional time; I refused his request as he had been given the opportunity on numerous occasions to at least secure

counsel or evidence of his entitlement to additional benefits.

At the time of trial on June 13, 2007, Plaintiff attempted to present evidence which was objected to. The objections were sustained inasmuch as the evidence was improperly presented.

Plaintiff has a burden of proof to establish all elements of his claim. He failed to present any admissible evidence to substantiate his entitlement to total and permanent disability benefits for either mental disability or industrial loss of use of his lower extremities. In view of this lack of evidence his claim must be denied.

WORKERS' COMPENSATION
BOARD OF MAGISTRATES

/s/ Paul Purcell
PAUL PURCELL,
MAGISTRATE (224G)

Signed on June 13, 2007 at Saginaw, Michigan.

ORDER

OF ADMINISTRATIVE LAW JUDGE

In the case of	**Claim for**
Carl Burnett (Claimant)	**Period of Disability and Disability Insurance Benefits**
(Wage Earner) (Leave blank if same as above)	[Social Security Number Omitted] (Social Security Number)

This case is before the undersigned Administrative Law Judge on a request for hearing filed on April 11, 1989. Under Section 404.1520a(d)(1)(IIi) of Social Security Regulation No. 4, an Administrative Law Judge may remand a case to a State Agency for evaluation of a claimant's mental disorder, completion of a standard document (the Psychiatric Review Technique Form) and a new determination if:

> (1) evidence that is not merely cumulative of evidence already in the case file is submitted in connection with the request for hearing;
>
> (2) where the issue of a mental impairment arises for the first time at the Administrative Law Judge hearing level.

In this case, the claimant's attorney, submitted a medical report dated November 2, 1982, by Richard Goldner, M.D., This report reveals that the claimant in addition to his physical problem, had a schizophrenia with paranoia and depressional elements

that had seriously interferred with his need for surgery. Because this evidence suggests the presence of a mental disorder [illegible] has not previously been evaluated, the Administrative Law Judge has decided to remand this case to the Michigan State Agency for evaluation of the [illegible] of the mental disorder and a new determination of the claimant's [illegible] perform work related functions.

Under authority of Section 404.1520a(d)(1)(iii), the Administrative [illegible] vacates the reconsideration determination dated March 21, 1989, and [illegible] this case to the Michigan State Agency for evaluation of the mental [illegible] including completion of the standard document (the Psychiatric Review [Illegible] Form), and a revised reconsideration determination. The claimant [illegible] be advised of the revised reconsideration determination on the case [illegible] the right to request a hearing with respect to that determination.

/s/ Donald [Illegible]
Donald [Illegible]
Administrative [Illegible]

January 11, [Illegible]

Order

Michigan Supreme Court
Lansing, Michigan

April 28, 2009

Marilyn Kelly,
Chief Justice

137780(20)

Michael F. Cavanagh
Elizabeth A. Weaver
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman
Diane M. Hathaway,
Justices

CARL BURNETT,

Plaintiff-Appellant,

v

GENERAL MOTORS CORPORATION, SELF-INSURED, and SECOND INJURY FUND/PERMANENT AND TOTAL DISABILITY PROVISION,

Defendants-Appellees.

SC: 137780
COA: 288091
WCAC: 07-000153

/

On order of the Court, the motion for reconsideration of this Court's February 24, 2009 order is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

[SEAL] I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

April 28, 2009 /s/ Corbin R. Davis
Clerk

STATE OF MICHIGAN
ATTORNEY DISCIPLINE BOARD

[SEAL]

MEMBERS
WILLIAM P. HAMPTON
CHAIRPERSON
LORI McALLISTER
VICE-CHAIRPERSON
WILLIAM L.
MATTHEWS, CPA
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REV. IRA COMBS, JR.
GEORGE H. LENNON
BILLY BEN BAUMANN, M.D.
HON. RICHARD F.
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WILLIAM J. DANHOF
ANDREA L. SOLAK

JOHN F. VAN BOLT
EXECUTIVE DIRECTOR
—
MARK A. ARMITAGE
DEPUTY DIRECTOR
—
JENNIFER M. PETTY
LEGAL ASSISTANT
211 WEST FORT ST.
SUITE 1410
DETROIT, MICHIGAN
48226-3236
PHONE: 313-963-5553
FAX: 313-963-5571
—
WWW.ADBMICH.ORG

NOTICE OF REVOCATION

Case No. 07-23-GA

Notice Issued: May 4, 2007

John L. Zorza, II, P 24516, Warren, Michigan, by the Attorney Discipline Board Tri-County Hearing Panel #104.

1. Revocation

2. Effective May 4, 2007

Respondent was found to be in default for his failure to file an answer to the formal complaint. Respondent also failed to appear at the public hearing.

Based on the default, the panel found that respondent, in a workers' compensation redemption hearing, failed to notify a client of a settlement offer; knowingly made a false statement of material fact to a tribunal; offered evidence respondent knew to be false; unlawfully altered a document having evidentiary value; and falsified evidence. In two other workers' compensation matters, respondent handled the legal matters without adequate preparation; neglected the matters; failed to act with reasonable diligence and promptness in the representations; failed to keep his clients reasonably informed about the status of their matters; failed to explain the matters to his clients to the extent reasonably necessary to permit the clients to make informed decisions regarding their representation; and failed to make reasonable efforts to expedite litigation consistent with the interests of his clients.

Respondent's conduct was in violation of MCR 9.104(A)(1)-(3); and Michigan Rules of Professional Conduct 1.1(b) and (c); 1.3; 1.4(a) and (b); 3.2; 3.3(a)(1) and (4); 3.4(b); and 8.4(a)-(c).

The panel ordered that respondent's license to practice law be revoked and that he pay costs in the amount of $1,703.39.

/s/ John F. Van Bolt
John F. Van Bolt

Dated: MAY 4 2007

STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

BUREAU OF WORKERS' DISABILITY COMPENSATION

CARL BURNETT,

PLAINTIFF

V CASE NO.:421-76-7882

GENERAL MOTORS,

DEFENDANT /

DIGITALLY RECORDED TRIAL

BEFORE MAGISTRATE PAUL M. PURCELL

SAGINAW, MICHIGAN – WEDNESDAY, JUNE 13, 2007

APPEARANCES:

FOR THE PLAINTIFF:	CARL BURNETT, In Pro Per
FOR THE DEFENDANT: GENERAL MOTORS	BRAUN KENDRICK FINKBEINER EMIL OGNISANTI (P23130) 4301 FASHION SQUARE BLVD SAGINAW, MI 48603 (989) 498-2100
FOR THE DEFENDANT: SECOND INJURY FUND	GILBERT SMITH & BORELLO LAWRENCE WM SMITH (P27029) 721 S MICHIGAN AVE SAGINAW, MI 48602 (989) 790-2500

TRANSCRIBED BY: REGENCY COURT REPORTING
3133 UNION LAKE ROAD
COMMERCE TOWNSHIP,
MI 48382
(248) 360-2145

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WITNESS: PLAINTIFF

NONE

WITNESSES: DEFENDANT

NONE

EXHIBITS:	IDENTIFIED	RECEIVED
PX1 MRI REPORT	19	19

[3] Saginaw, Michigan

Wednesday, June 13, 2007 – 10:47 p.m.

* * * * *

PROCEEDINGS

MAGISTRATE PURCELL: I'm going to call the case of Carl Burnett versus General Motors and Second Injury Fund Affirmative and Total Disability Provisions. Mr. Burnett is here representing himself and may I please have the appearance of attorneys for General Motors and the State of Michigan?

MR. OGNISANTI: Good morning Your Honor, Lou Ognisanti appearing this morning on behalf of the General Motors Corporation, P23130.

MR. SMITH: And Lawrence Smith Judge, on behalf of the Second Injury Fund Affirmative and Total Provisions, P27029.

MAGISTRATE PURCELL: Thank you. Mr. Burnett has indicated he is here representing himself. And we've had a number of discussions, I have, with Mr. Burnett as to the fact that it is a difficult claim to establish; that his claim is a difficult claim to establish and that it would be beneficial if, he had a lawyer. Of course he can represent himself. This case has been set for Trial [4] five times and initially back in November and December I gave Mr. Burnett additional time to either find a lawyer and take medical testimony or do something. I then moved it to a control date in February to give Mr. Burnett time to get representation or – or to get something – to do something. We then moved it to March 7, again saying that he's just got to do something. I then moved it to April 11 as an absolutely last trial date. Mr. Burnett and I discussed it at that time and I said that he's just got to do something, talk to people and find out what he wants to do, either represent himself or whatever. At that time, I believe that was the time I gave him some case law, copies of decisions concerning the nature of his claim and what he had to prove. And I told him that he would need testimony from his physician or we could use medical records, which he could introduce under the provisions of the

Act and Rules. So today is the absolutely last trial date. This case is number two on the docket, number one case resolved. So this now case is ready for trial. Mr. Burnett, are you ready to proceed or not?

MR. BURNETT: Judge I'm not ready to [5] proceed because I didn't have a high school education and I need time, I am being forced to take this case because of the first lawyer who could have did all this at the first time, Edward Gallagher. And that Edward Gallagher failed me in this case and that I cannot represent myself in this case. I'm asking the Court for more time to get me an attorney so I can get the doctor's deposition and to represent me. That's – this is a misjustice because they are skilled and trained, trained – they got a high school education.

MAGISTRATE PURCELL: Absolutely right sir, trained as lawyers.

MR. BURNETT: They trained and I mean I don't have a high school education. I don't understand certain things that's going on here. I'm up on the medication and all I came here for was to try to get a full disability from my job. Judge Freidman (ph) in Detroit asked me could – have General Motors ever offered me a job; they never have. And they asked me could I work and I said, "No, I cannot". And he got on the paper that my lawyer failed me, failed to represent me in my case and appropriately and that I'm asking for more time [6] to get me a counsel so that I can get the deposition from my doctor and that my documents along with me that said, "Get you a

lawyer" so that I can have someone to represent me. I just need more time. I mean the lawyer, John Zola (ph) did not notify me, let me know that he was retiring until Christmastime and I had from Christmastime, from the 12th month until the 6th month to try to find a lawyer. I stay in Detroit. I have to catch the bus back and forth here. I mean I have to catch the bus in Detroit to get around to find a lawyer, back and forth here and get them to represent me. I have been to many of the lawyers in Detroit and they said they doesn't take – or do business in Saginaw but get a lawyer in Flint or Saginaw to represent me. And each one of them is trying to tell me that I do have a case and I just need more time, that's all I'm asking for. I'm asking for General Motors, Second Injury Fund to give me more time to get me counsel.

MAGISTRATE PURCELL: Now I talked to you before and I said – were my statements correct that we've talked and I told you what to do or I said we needed some evidence; right?

MR. BURNETT: Right, I can get the [7] evidence –

MAGISTRATE PURCELL: And you talked to your doctor about a deposition; correct?

MR. BURNETT: Yes.

MAGISTRATE PURCELL: And he said you wouldn't do one unless you had a lawyer; is that correct?

MR. BURNETT: He said, "Get you a lawyer, that's the best way."

MAGISTRATE PURCELL: And so this was some time ago that you talked to him?

MR. BURNETT: No, this was in –

MAGISTRATE PURCELL: Since we were here last time in April?

MR. BURNETT: Yes.

MAGISTRATE PURCELL: And the time before that I told you to get a lawyer; didn't I? Or, that you had to have evidence; correct?

MR. BURNETT: No, you told me to get a lawyer; you were going to allow me the time to get a lawyer.

MAGISTRATE PURCELL: Yeah –

MR. BURNETT: And that my doctor –

MAGISTRATE PURCELL: – now you –

[8] MR. BURNETT: – I got a doctor appointment today at 4:00 and give me more time to go and show my doctor that he just going to have to give me what I need to give this Court.

MAGISTRATE PURCELL: Well Mr. Burnett I've bent over backwards. I really think I have. Either you're ready to proceed today or you're not. Are you ready to proceed?

MR. BURNETT: Will the Court grant me more time?

MAGISTRATE PURCELL: No.

MR. BURNETT: Well I'm ready to proceed.

MAGISTRATE PURCELL: Pardon?

MR. BURNETT: I'm ready to proceed –

MAGISTRATE PURCELL: Okay –

MR. BURNETT: – if the Court refusing me, but can I put in my objection to that?

MAGISTRATE PURCELL: You have.

MR. BURNETT: No I – I mean –

MAGISTRATE PURCELL: Okay –

MR. BURNETT: – can I put in my objection and say I object to the Court not giving me time up under the Constitutional Right it says a man [9] has the right to have a counsel.

MAGISTRATE PURCELL: No he doesn't have right to have counsel in this – he has a right if you can find a lawyer to take your case.

MR. BURNETT: Yes.

MAGISTRATE PURCELL: Now, okay proceed with your case. Would you raise your right hand please?

MR. BURNETT: Yes.

MAGISTRATE PURCELL: Do you swear or affirm that your testimony here today will be the truth, the whole truth and nothing but the truth?

MR. BURNETT: Yes it is.

MAGISTRATE PURCELL: And would you tell me your name?

MR. BURNETT: My name is Carl Burnett.

MAGISTRATE PURCELL: Mr. Burnett, what is your address please?

MR. BURNETT: My address is P.O. Box 71313 Madison Heights, Michigan 48071.

MAGISTRATE PURCELL: P.O. Box 71313?

MR. BURNETT: Yes.

MAGISTRATE PURCELL: Okay, and tell me the nature of your case please?

[10] MR. BURNETT: The nature of my case is for full disability up under the Total and Permanent Disability.

MAGISTRATE PURCELL: Okay. And why are you disabled?

MR. BURNETT: From two disabilities One is November 1; I came up under mental disability as in Schizophrenic and the other one is the loss – the industrial loss of leg from the L4, L5 area, up under the 500 weeks. My doctor put down up under the 500 weeks, since 1988, I had –

MAGISTRATE PURCELL: For what now; is this for the legs?

MR. BURNETT: Yeah, this is for the legs. That she changed the report to 1997 and the doctor –

MR. OGNISANTI: Excuse me –

MR. SMITH: Excuse me –

MAGISTRATE PURCELL: Okay, I don't know –

MR. OGNISANTI: I will place an objection to anything that the doctor said and any medical testimony –

MAGISTRATE PURCELL: Sustained –

[11] MR. SMITH: I'll join in that objection Your Honor; thank you.

MAGISTRATE PURCELL: Sustained. You have to follow the Rules of Evidence here unfortunately, or fortunately.

MR. BURNETT: Okay.

MAGISTRATE PURCELL: And so consequently you're bound by the same rules that these fellows are trained in because you're representing yourself, so we can't say what the doctors said or didn't say, other than what may be in evidence.

MR. BURNETT: Well that is a miscalculated date that the doctor put down 1997 and it should be 1991 –

MAGISTRATE PURCELL: Well that issue has already been decided as I understand the file; is that correct gentlemen?

MR. OGNISANTI: That's my understanding Your Honor, that there was a previous trial; I've not looked at this file lately but my understanding is that that issue was tried. And that's why I guess it's race judicata –

MR. SMITH: And I will join in that –

[12] MR. BURNETT: I object and I'd like to put my objection in from the first trial of Edward Gallagher for failing to represent me properly.

MAGISTRATE PURCELL: Okay, well that issue has been decided. You understood that; right?

MR. BURNETT: No sir, I did not understand.

MAGISTRATE PURCELL: The industrial loss use of the leg claim has been already decided.

MR. BURNETT: No sir, general disability was filed on me. I never had a trial up under the industrial loss of legs.

MAGISTRATE PURCELL I think somewhere that –

MR. OGNISANTI: I believe that's not an accurate statement Your Honor.

MR. BURNETT: I never had a trial up under the industrial loss of legs; I only had a trial up under the general disability.

MAGISTRATE PURCELL: This was received by the Court of Appeals in 2001, so something –

MR. BURNETT: That was appealed; the lawyer wanted to withdraw the industrial loss of legs, that's what this was. John Von (ph) wanted to [13] withdraw because he said that Edward Gallagher had committed malpractice –

MAGISTRATE PURCELL: Well –

MR. BURNETT: – in the case,

MAGISTRATE PURCELL: That claim, as I understand it, has already been denied anyway. What about the mental disability, your Schizophrenia; when did that develop?

MR. BURNETT: By 1992. That the doctor diagnosed me in November of 1992.

MR. OGNISANTI: Judge –

MAGISTRATE PURCELL: Sustained –

MR. OGNISANTI: – once again, thank you; I was just going to have to place that objection that – that this man's self diagnosis is not credible.

MR. BURNETT: It's on paper; I got proof.

MAGISTRATE PURCELL: Well did you you have to file certain notices that are called 42 Day

Notices in order to submit medical records under the Rules. So, I'm going to deny you the right to file papers because you have to tell them you're going to do that ahead of time and give them notice [14] to object to those papers or any reports –

MR. BURNETT: This is a what the doctor put down hisself to Social Security that this is his diagnosis to Social Security in November 1992.

MAGISTRATE PURCELL: Well you need medical testimony on that or you need to have the reports authenticated under Rule, what is it Five or Six?

MR. OGNISANTI: I think it's Rule Five Your Honor.

MAGISTRATE PURCELL: Under Rule Five of the Administrative Rules that deal with Workers Compensation Agency. There's rules for that –

MR. BURNETT: But you said this was about –

MAGISTRATE PURCELL: I'm sorry?

MR. BURNETT: – you said it was about mental; right?

MAGISTRATE PURCELL: Well that's part of your claim.

MR. BURNETT: You said when did mental happen; I'm telling you when mental happened.

MAGISTRATE PURCELL: Okay, but you can't tell me about what the doctor's say, so –

[15] MR. BURNETT: No, no –

MAGISTRATE PURCELL: I'm just asking you –

MR. BURNETT: – show on the paper from the doctor what day he put down that – when the diagnosis was.

MAGISTRATE PURCELL: Well you told me it was '82, so that's what your claim is. Now you have to prove it.

MR. BURNETT: Okay, and here's the proof; can I –

MR. OGNISANTI: I'm going to object Your Honor.

MAGISTRATE PURCELL: Well let's see what he has first. What are you going to try to show me?

MR. OGNISANTI: Social Security paper where he sent in to Social Security in 1982.

MAGISTRATE PURCELL: Who the doctor?

MR. OGNISANTI: The Social Security –

MAGISTRATE PURCELL: That doesn't –

MR. OGNISANTI: – Donald Brown –

MAGISTRATE PURCELL: That's not admissible because it wasn't properly noticed under [16] Rule Five.

MR. BURNETT: Well Your Honor, I don't know how to file nothing under Rule Five.

MAGISTRATE PURCELL: You talked to many lawyers and the lawyers didn't want your case; correct?

MR. BURNETT: No, some lawyers didn't want my case. Some lawyers did want my case but they didn't feel that they could come to Saginaw –

MAGISTRATE PURCELL: That's true; they didn't take your case; did they? So if you want to proceed you have to do it according to the rules. Do you have anything –

MR. BURNETT: Well Your Honor, can I be allowed to file this report?

MAGISTRATE PURCELL: You can – no because they are objecting – gentlemen, do you object to that report?

MR. OGNISANTI: I don't know what report he's referring to Your Honor –

MAGISTRATE PURCELL: Show it to them –

MR. OGNISANTI: – if I saw it.

MR. BURNETT: This is from Social [17] Security – I mean the doctor –

MR. OGNISANTI: Well, one of the problems with this Your Honor, is of course it's difficult to read because part of it is chopped off and – well Your Honor, for the Record, this appears to be an Order of an Administrative Law Judge under the Social Security Administration and part of the problem here Your Honor, is that it is – there is a part of it that is illegible. But I don't think – I don't think there's any –

MAGISTRATE PURCELL: That doesn't establish anything in this Court anyway.

MR. OGNISANTI: Besides that Your Honor, if I read this Order correctly it's simply an order remanding something back to an Administrative Law Judge; that's all it is. So I guess my objection would be is it's not a relevant document.

MR. SMITH: I agree with the comments of co-counsel; this matter Judge is certainly not a medical document; it's not medical and does not constitute medical evidence and therefore, I believe it is also irrelevant.

MAGISTRATE PURCELL: Sustained. Okay, that won't be allowed. Do you have any admissible [18] evidence Mr. Burnett, to substantiate your claim of mental disability or loss of industrial use of the legs, other than what you've –

MR. BURNETT: Yes, industrial loss of legs at St. Mary's Hospital.

MAGISTRATE PURCELL: Is that noticed under the Act of Rule Five?

MR. BURNETT: That document there –

MAGISTRATE PURCELL: I don't see any Rule Five Notice of Intent to Submit in the File so; therefore, that is – that document will not be allowed into evidence.

MR. BURNETT: There's an MRI test from St. Mary's Hospital Your Honor.

MAGISTRATE PURCELL: I don't see a Rule Five Notice, so that will not be –

MR. BURNETT: You have that in my file already, that paper from St. Mary's Hospital.

MAGISTRATE PURCELL: Your file is quite thick.

MR. OGNISANTI: Your Honor, as far as this document is concerned, we – Mr. Smith and I would waive the 42 day period if you want to accept this.

[19] MAGISTRATE PURCELL: Okay, fine then it's admitted.

MR. OGNISANTI: But I don't think it goes to the issue that you want it to, but we'll have no objections to it.

MAGISTRATE PURCELL: I'll mark it as Plaintiff's Exhibit Number One and it's admitted.

(WHEREUPON, Plaintiff's Exhibit Number One was admitted at this time)

MR. BURNETT: Here is my second positive from my doctor –

MR. OGNISANTI: Well, I'm going to object –

MR. BURNETT: – goes to character; that's what you all have already.

MR. OGNISANTI: I'm going to object Judge; there was not proper notice and no opportunity to Cross-Examine.

MAGISTRATE PURCELL: Sustained.

MR. SMITH: I join in that objection.

MR. BURNETT: But you have this in my file already.

MAGISTRATE PURCELL: Well, just because it's in the file doesn't mean it's [20] admissible.

MR. BURNETT: Well can I ask the Court for everything in my file to be permissible?

MAGISTRATE PURCELL: The only thing that would be are things that are previously admitted in your trial from before and anything that's properly admitted. Just because something is in the file doesn't mean it's admissible, there's all kinds of stuff in here that I can't read because it's not admissible.

You stapled letters from attorneys, to your application and things of that nature –

MR. BURNETT: Mm-hmm –

MAGISTRATE PURCELL: – those are in the file, but they're not evidence of anything because they're not properly before me. I can't read things that aren't properly admitted. There are certain rules that have to be followed. Just as they can't just file stuff.

MR. BURNETT: Well I don't have any proof from them that I can work.

MAGISTRATE PURCELL: That's your burden of proof. You have the burden to establish your case Mr. Burnett; do you have anything else?

MR. BURNETT: I mean if you don't –

[21] MAGISTRATE PURCELL: Do you have anything else?

MR. BURNETT: Yes. Here this from – from where I retire saying that I'm totally and permanently –

MR. OGNISANTI: Your Honor, this is a document that appears to be a document from General Motors Corporation indicating that he has a pension.

MR. BURNETT: And Total and Permanent on the paper – Total and Permanent right there up under.

MAGISTRATE PURCELL: Mr. Burnett that would not be binding upon me, in any event and number two, I don't know the definition General Motors uses to allow you to get benefits under that provision. So it's not relevant to this Court.

MR. OGNISANTI: I'm going to object to it –

MR. BURNETT: What do you mean –

MR. OGNISANTI: – really is irrelevant, there is nothing in there that says –

MR. BURNETT: – that's it right there; Total and Permanent Disability.

MAGISTRATE PURCELL: I assume that you [22] receive a – or that they've decided you're totally and permanently disabled. I don't know why. It's not binding on my, they're definitions are different. I don't know why they decided that; it's not relevant to me, to my findings.

MR. BURNETT: Wait a minute Judge, why is this going like this if General Motors put down that I'm totally and permanent, Social Security is paying me for a total and permanent disability loss –

MAGISTRATE PURCELL: They're paying you for – that's not total and permanent. Under the Social Security Act to determine, apparently – apparently, I don't know this and it's not relevant to me, you've been determined to be disabled under their laws, under their provisions.

MR. BURNETT: Right.

MAGISTRATE PURCELL: That's not relevant to what my findings are. You made a certain claim here. You have to prove it. You've been given –

MR. BURNETT: Well here's my case and here it is I want to give you papers saying that I'm total and permanent physical and mentally, here it is [23] and my doctor say that I am a Schizophrenic; Schizophrenic is total and permanent.

MAGISTRATE PURCELL: I don't know that. There is not evidence in the file to tell me that. You have the burden of proof to establish your claim.

MR. BURNETT: Well Judge, you won't even let me put the doctors report in saying that I'm total and permanent.

MAGISTRATE PURCELL: Did we or did we not discuss the fact that you needed medical evidence?

MR. BURNETT: Yes.

MAGISTRATE PURCELL: And do you have any –

MR. BURNETT: Yeah, this is medical evidence.

MAGISTRATE PURCELL: I advised you you needed testimony from the physician or records to be introduced pursuant to the rules. The last time you were here I told you this; didn't I?

MR. BURNETT: Yes.

MAGISTRATE PURCELL: And do you –

MR. BURNETT: Okay –

[24] MAGISTRATE PURCELL: – have – did you follow those rules; no.

MR. BURNETT: Yes. Yes I did.

MAGISTRATE PURCELL: There's no Rule Five Notice.

MR. BURNETT: I went to my psychiatrist

MAGISTRATE PURCELL: And he wouldn't give you testimony; is that right?

MR. BURNETT: Yes he gave me testimony; he signed papers to the fact that how long he'd been my doctor and signed papers to the fact that I'm disabling and cannot work and that I'm taking Thorazine (ph) and Luimille (ph) as medication. And that General Motors also signed document of total and permanent disability, that's what's on my check, my Workman's Compensation check – it got on there "Temporary Total and Permanent Disability". Now if total is one word then why they paying me Workers Compensation up under the Total and Permanent Disability? If it's not total and permanent.

MAGISTRATE PURCELL: Do you have any further evidence?

[25] MR. BURNETT: Yes, from Workers Compensation saying that it's total and permanent on my check.

MAGISTRATE PURCELL: We discussed that; do you have anything else?

MR. BURNETT: I mean, you won't let me file the papers that I need to file so I need to ask you this question if I can't file what I need to file and the burden of proof is on me, then what do I need to do here to convince this Court that you making me seem like I'm some kind of criminal.

MAGISTRATE PURCELL: Nobody is saying – I'm not saying you're some kind of criminal.

MR. BURNETT: I mean the paperwork that I'm showing – they objecting to the paperwork – you all sitting smirking and laughing.

MAGISTRATE PURCELL: I don't see anybody smirking and laughing.

MR. BURNETT: Sir –

MAGISTRATE PURCELL: I don't like to do this Mr. Burnett –

MR. BURNETT: – when I came – I'll tell you Your Honor –

MAGISTRATE PURCELL: I've given you –

[26] MR. BURNETT: – I'd like to withdraw my claim –

MAGISTRATE PURCELL: You want to withdraw your claim?

MR. BURNETT: – claim because the Court is not treating me fairly, right? I think that there's a racist being involved in here –

MAGISTRATE PURCELL: Mr. Burnett, there is none of that –

MR. BURNETT: – and I need time to get me a lawyer. I want time to file again so that I can get me a lawyer –

MAGISTRATE PURCELL: You want –

MR. BURNETT: – time to get me a lawyer. This Court could have gave me more time if it had any type of consideration for my disability –

MAGISTRATE PURCELL: Mr. Burnett, I've given you time; I'm not going to argue with you. Do you want to withdraw your claim; is that what you're telling me?

MR. BURNETT: No, I want help; that's what I'm asking for. Can I have –

MAGISTRATE PURCELL: You've have your trial here today; no, I'm not giving you any more [27] time.

MR. BURNETT: Judge, that's not fair. I need counsel. I mean –

MAGISTRATE PURCELL: Mr. Burnett, I'm not going to argue with you. Do you have any more evidence that you want to try to produce here today?

MR. BURNETT: Let me ask you this question, although I can't present this evidence today, can I come back after I go to my lawyer this evening and have new evidence that I can bring in tomorrow morning?

MAGISTRATE PURCELL: You said you're going to your doctor today?

MR. BURNETT: Today. Can I bring new evidence in the morning?

MAGISTRATE PURCELL: No, today is the day. You and I discussed this –

MR. BURNETT: Now wait a minute now, don't I have time enough to appeal? Don't I have time enough to bring stuff in to appeal? Don't I have an appeal process going on?

MAGISTRATE PURCELL: There is an appeal process; yes.

MR. BURNETT: Okay.

[28] MAGISTRATE PURCELL: But first I have to – do you want – do you have any more evidence?

MR. BURNETT: I don't have nothing but from the doctor, from my psychiatrist – from Dr. –

MAGISTRATE PURCELL: They've objected to all of that and I sustained it; do you have anything else?

MR. BURNETT: What about the doctor – what about the doctor that does – that give me treatment for my back? There's a – got to think of his name now, Dr. –

MAGISTRATE PURCELL: Do you have any evidence of that?

MR. BURNETT: Yes, Dr. – from my Detroit – the doctor that I'm up under now in Detroit. Why don't they have that? Why don't they have anything from that doctor?

MAGISTRATE PURCELL: I don't know why they got –

MR. BURNETT: They've got a report over there from that doctor –

MAGISTRATE PURCELL: It's your burden of proof, do you want – do you have any other evidence you wish to introduce?

[29] MR. BURNETT: Yes, I want to introduce that evidence from that doctor, Dr. –

MAGISTRATE PURCELL: Well, do you have it?

MR. BURNETT: Dr. Cardulle (ph).

MAGISTRATE PURCELL: Do you have it?

MR. BURNETT: Yes.

MAGISTRATE PURCELL: If you'll show it to them they will either – they'll do something. Look it, separate the envelopes. Put the stuff you don't need on one side of the table because you look through the same thing all the time.

MR. BURNETT: Your Honor, I'm nervous –

MAGISTRATE PURCELL: Well so am I –

MR. BURNETT: – I never did this before.

MAGISTRATE PURCELL: I understand.

MR. BURNETT: And I'm just asking –

MAGISTRATE PURCELL: No, you had a trial before; you've been through this before.

MR. BURNETT: But I had a lawyer – when I went through this before I had a lawyer.

MAGISTRATE PURCELL: Please, do you [30] have any other evidence?

MR. BURNETT: Your Honor, why you being so harsh between me now; I mean I thought you were a fair man.

MAGISTRATE PURCELL: I am; or I try to be.

MR. OGNISANTI: Your Honor, I'm going to state for the Record, I know – in my opinion, I think Mr. Smith shares this, I think you have been very

tolerant of Mr. Burnett's presentation of his case and as I think Your Honor realizes, we have said very little because we don't want to make it – we do not want to be harsh to Mr. Burnett. But there does come a point when the Plaintiff does have to produce some evidence and you keep asking for it and all he does is say – ask you questions and argue with you because you won't rule in his favor. So there comes a point when either he's got to present more admissible evidence or the Record has to be stopped I guess.

MAGISTRATE PURCELL: Well, we're getting to that point.

MR. OGNISANTI: Okay, thank you Your Honor.

[31] MAGISTRATE PURCELL: Thank you.

MR. BURNETT: Your Honor –

MAGISTRATE PURCELL: Do you have any other evidence?

MR. BURNETT: Yes I do Your Honor. Can I be allowed to bring in anything else tomorrow –

MAGISTRATE PURCELL: Today is the day –

MR. BURNETT: – the next day; you said I have an appeal process in this case –

MAGISTRATE PURCELL: Yes –

MR. BURNETT: – right. Apparently your decision is that you going with General Motors. So I'd like to find out can I have – can I have time – if my doctor done gave me a different report today, can I bring it to you in the morning?

MAGISTRATE PURCELL: No because it's not under the rules. We have rules. That is not proper under the rules to get a report from your doctor and bring it in.

MR. BURNETT: Can –

MAGISTRATE PURCELL: Do you have anything today Mr. Burnett –

[32] MR. BURNETT: Can I ask the Court if – if I withdrew my case, can you give me this time – if I withdraw my case can I be – please have the time to re-file?

MAGISTRATE PURCELL: I don't get into that; you either want to proceed today or withdraw your application. So far –

MR. BURNETT: That's all I'm asking Your Honor, if I withdraw today to get – take time to get me a lawyer, to get the –

MAGISTRATE PURCELL: I don't know what

MR. BURNETT: – to get these things that you want –

MAGISTRATE PURCELL: I don't know what ramifications that would have on your case; I do not know.

MR. BURNETT: You know if I can come back and file or not.

MAGISTRATE PURCELL: I don't know if you can come back – you can always file something, that doesn't mean it's going to work. I'm not giving you legal advice. You're either ready to proceed or you're not. So far –

[33] MR. BURNETT: I'm not ready to proceed today.

MAGISTRATE PURCELL: For 27 minutes; do you have any further evidence?

MR. BURNETT: I'm not ready to proceed today.

MAGISTRATE PURCELL: Well do you want to withdraw your application; it's up to you –

MR. BURNETT: No, I don't want –

MAGISTRATE PURCELL: – I don't know what effect that would have on this. You may lose your entire case. What do you want – you tried to proceed –

MR. BURNETT: Let's go on – let's keep on proceeding.

MAGISTRATE PURCELL: Okay, do you have any evidence?

MR. BURNETT: I have evidence from Dr. Allen Cabulle –

MAGISTRATE PURCELL: Do –

MR. BURNETT: – Dr. Richard – let me name –

MAGISTRATE PURCELL: No, no, no; do you have papers with you?

[34] MR. BURNETT: Yes.

MAGISTRATE PURCELL: I'm losing patience.

MR. BURNETT: Alan Cabulle –

MAGISTRATE PURCELL: Mr. Burnett, you and I have discussed this case a lot of –

MR. BURNETT: Wait, I don't have – I got to find the papers; give me time to find the papers.

MAGISTRATE PURCELL: Put the envelopes on the side; you've shuffled the same envelope five times.

MR. BURNETT: Okay.

MAGISTRATE PURCELL: I've watched you; you've just opened that for the third time. Put the papers you don't want on one side of the table. You've already looked at that one a number of times.

MR. BURNETT: What about Brenda –

MAGISTRATE PURCELL: Do you wish to make an offer of evidence?

MR. BURNETT: Yeah, Dr. Brenda Cotton (Ph).

MAGISTRATE PURCELL: I know nothing about these things. What do you want to do? Do you [35] have the paper?

MR. BURNETT: I have evidence from Dr. Brenda Cotton –

MAGISTRATE PURCELL: Do you want to show us –

MR. BURNETT: – my doctor –

MAGISTRATE PURCELL: You have to show that paper to the other – to the attorneys. Whatever you want to put into evidence, you have to show them and then they have the right to object.

MR. OGNISANTI: Once again Judge, Defendant was not given an opportunity to Cross-Examine this doctor. I just have no choice but to object.

MR. SMITH: I have to join in the objection; Your Honor.

MAGISTRATE PURCELL: That's sustained; it was not noticed under Rule Five. That will not be allowed. Do you have any other further evidence?

MR. BURNETT: Your Honor, how long a day do I have to find these things that you need to file?

MAGISTRATE PURCELL: Today is your trial; do you have any other evidence?

[36] MR. BURNETT: How many days after that?

MAGISTRATE PURCELL: After that?

MR. BURNETT: Don't I have 30 days to appeal?

MAGISTRATE PURCELL: No, when I close the Record I'm done and then – there's an appeal process.

MR. BURNETT: Well how long is the appeal process?

MAGISTRATE PURCELL: I don't give advice. That will come to you from the State of Michigan and there will be an Order with my Opinion. Do you have any other evidence? Please don't shuffle the same papers.

MR. BURNETT: What about the attorney John –

MAGISTRATE PURCELL: Do you have any other evidence?

MR. BURNETT: When he filed for permanent and total and that was withdrawn because

the first attorney filed and he asked me to withdraw the claim because the attorney committed malpractice in this case.

[37] MAGISTRATE PURCELL: Do you have any other evidence Mr. Burnett?

MR. BURNETT: Nothing about this point; from Cynthia Johnson – here it is.

MAGISTRATE PURCELL: Mr. Burnett, do you have any other evidence?

MR. BURNETT: No, I don't have any other evidence.

MAGISTRATE PURCELL: Okay, that completes your case. Mr. Smith, do you wish to offer any evidence?

MR. SMITH: No Your Honor.

MAGISTRATE PURCELL: Mr. Ognisanti?

MR. OGNISANTI: Nothing, thank you.

MAGISTRATE PURCELL: The Record is closed. Thank you all very much. An Opinion will be issued.

MR. OGNISANTI: Thank you.

MR. SMITH: Thank you.

MAGISTRATE PURCELL: Thank you.

(proceedings concluded at 11:19 a.m.)

[38] STATE OF MICHIGAN)
) SS
COUNTY OF OAKLAND)

CERTIFICATE

I hereby certify that this transcript, consisting of thirty-eight (38) pages, represents the complete true and correct rendition of the digital recording of the proceedings and testimony taken in this case as recorded on June 13, 2007.

I further state that I assume no responsibility for any events that occurred during the above proceedings or any inaudible responses by any party or parties that are not discernible on the recording of the proceedings.

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Date: September 30, 2008

STATE OF MICHIGAN
MICHIGAN SUPREME COURT

CARL BURNETT,

Plaintiff-Appellant,

v.

GENERAL MOTORS CORPORATION, SELF INSURED; SECOND INJURY FUND/ PERMANENT AND TOTAL DISABILITY PROVISION,

Defendants-Appellees.

DOCKET #07-0153
COA Docket No.: 288091

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APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

It was abuse of judicial discretion by the Court of Appeal to dismiss Plaintiff-Appellant's appeal for lack of jurisdiction. The Court of Appeal had jurisdiction over the matter by leave of court when filed within 30 days of the Order of the Workers' Compensation Appellate Commission pursuant to Section 418.861a of the Workers Disability Compensation Act. The Order of the Workers' Compensation Appellate Commission was dated September 9, 2008 and the matter was appealed to the Court of Appeals within 30 days on October 3, 2008. Under paragraph 6 of the Jurisdictional Checklist, the Appellant made the following notation: "An Appeal by Leave of Court – MCR 7.203(B)(3).

The issue on appeal was the Magistrate denial of Plaintiff-Appellant's request to adjourn the trial of June 13, 2007. The Magistrate commenced trial after turning down Plaintiff-Appellant's to adjourn in order to secure legal representation. Hitherto, Plaintiff-Appellant's counsel had retired and could no longer represent him. The commencement of trial without legal representation placed the Plaintiff-Appellant at an extreme disadvantage. The denial of the request of adjournment was an unreasonable exercise of judicial discretion or in other words an abuse of judicial discretion.

The Workers' Compensation Appellate Commission did affirm the decision of the Magistrate that the failure to adjourn trial under the circumstances was not an abuse of discretion by the Magistrate. This is clear error and has created a prejudicial effect upon the Plaintiff-Appellant.

STATEMENT OF FACTS

The Plaintiff-Appellant, Carl Burnett, who is currently 54 years old with 9th grade education, suffered an injury during the course of his employment at General Motors on October 19, 1979. Following the injury, Magistrate Cynthia Johnson tried the claim and issued a decision dated November 5, 1999 in which she found that Plaintiff-Appellant suffered a herniated disc which resulted in ongoing problems. She entered an open award. During trial, the parties agreed that the Plaintiff-Appellant was paid weekly benefits through May 8, 1998. The opinion further stated that Plaintiff-Appellant's last date of employment was July 16, 1981. Magistrate Johnson's decision was not appealed.

On November 7, 2005, Plaintiff-Appellant filed an Application for Mediation or Hearing in which he sought a hearing to determine that his injury qualified as total and permanent disability under two separate subsections of the Workers' Compensation Act; the one dealing with mental injury and the one dealing with loss of industrial use of both legs. Plaintiff-Appellant was represented by an attorney

until the attorney's retirement in December 2006. Thereafter, Plaintiff-Appellant was given six months to get another lawyer. On the day of the trial, Plaintiff-Appellant requested a continuance because of the inability to properly represent himself and his level of education. (T 4-5).

At the time of trial on June 13, 2007, Plaintiff-Appellant attempted to present evidence which was objected to. The objections were sustained inasmuch as the evidence was improperly presented. Plaintiff-Appellant claim was denied as he lacked the skill and education to present any admissible evidence to substantiate his entitlement to total and permanent disability benefits for either mental disability or industrial loss of use of his lower extremities.

ARGUMENT I

THE MAGISTRATE VIOLATED THE DUE PROCESS CLAUSE WHEN HE COMMENCED TRIAL KNOWING THAT THE PLAINTIFF WAS INCAPABLE OF REPRESENTING HIMSELF

The magistrate violated the Due Process Clauses of XVI Amendment of the U.S. Constitution and Article 1, § 17 of the Michigan Constitution when he commenced trial with the knowledge that the Plaintiff was incapable of representing himself. The Plaintiff had a property interest in his total and permanent disability claim that was denied when he was forced to commenced trial without the skill and knowledge of presenting evidence. It is the purpose of

the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims. *William v Hofley Mfg. Co.*, 430 Mich 603 (1988). Testimony at trial indicates that plaintiff was incapable of representing himself. (T 4-5). Specifically, the plaintiff testified that:

> Mr. Burnett: Judge I'm not ready to proceed because I didn't have a high school education and I need time . . . I cannot represent myself in this case. I'm asking the court to give me more time to get an attorney so that I can get the doctor's deposition and to represent me. That's – this is a misjustice because they are skilled and trained, trained – they got a high school education.
>
> Magistrate Purcell: Absolutely right sir, trained as lawyers.
>
> Mr. Burnett: They trained and I mean I don't have a high school education. I don't understand certain things that's going on here. I'm up on the medication and all I came here for was to try to get a full disability from my job.

The right of all individuals to fair and just treatment in the course of investigations and hearings shall not be infringed. (MCLS Const. Art. 1, §17).

ARGUMENT II

THAT THE MAGISTRATE ERRED AS A MATTER OF LAW IN COMMENCING TRIAL WHEN PLAINTIFF WAS INCAPABLE OF PRESENTING THE EVIDENCE

The Magistrate erred when he commenced trial with the knowledge that Plaintiff was incapable of presenting evidence. (T10-11). Plaintiff testified that:

> Mr. Burnett: The nature of my case is for full disability up under the Total and Permanent Disability.
>
> Magistrate Purcell: okay. And why are you disabled?
>
> Mr. Burnett: From two disabilities. One is November 1; I came up under mental disability as in Schizophrenic and the other one is the loss – the industrial loss of leg from the L4, L5 area, up under the 500 weeks. My doctor put down up under the 500 weeks, since 1988, I had –
>
> Magistrate Purcell: For what now; is this for the legs?
>
> Mr. Burnett: Yeah, this is for the legs. That she changed the report to 1997 and the doctor –
>
> Mr. Ognisanti: Excuse me –
>
> Mr. Smith: Excuse me –
>
> Magistrate Purcell: Okay, I don't know –

> Mr. Ognisanti: I will place an objection to anything that the doctor said and any medical testimony –
>
> Magistrate Purcell: Sustained –
>
> Mr. Smith: I'll join in that objection your Honor; thank you.
>
> Magistrate Purcell: Sustained. You have to follow the Rules of Evidence here unfortunately, or fortunately.
>
> Mr. Burnett: Okay.
>
> Magistrate Purcell: And so consequently you're bound by the same rules that these fellows are trained in because you're representing yourself, so we can't say what the doctors said or didn't say, other than what may be in evidence.

The Plaintiff had the burden to prove his case. The commencement of trial with knowledge that the Plaintiff does not understand the intricacies of presenting evidence amounts to an injustice. To prevail, Plaintiff would have had to provide trial evidence to opposing counsels in advance of the trial date.

ARGUMENT III

PLAINTIFF'S EVIDENCE WOULD HAVE SHOWN TOTAL AND PERMANENT DISABILITY

Plaintiff's evidence would have shown total and permanent disability. The Plaintiff would have met the standard of *Sington v. Chrysler Corp.*, 467 Mich.

144 (2002). According to the Court in *Sington*, an individual is required to show there is a work-related disability in order to receive workers' compensation benefits. Specifically, the Court in *Sington* stated that, "If the employee is no longer able to perform any of the jobs that pay the maximum ages, given the employee's training and qualifications, a disability has been established under §301(4)." (Id). In addition, §418.301(1) of the Workers' Compensation Disability Act states, "(4) As used in this chapter, 'disability' means a limitation of an employee's wage-earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work-related disease." While Plaintiff's claim for loss of industrial use of both legs may be barred by res judicata, the Plaintiff would have been able to prove total and permanent disability for incurable insanity. The definition of *incurable insanity or imbecility* was discussed in *Redfern v Sparks-Withington Co*, 403 Mich 63, 268 NW2d 28 (1978). The court reasoned that ordinary disability benefits are payable on the basis of a person's inability to work, whereas the determination of total and permanent disability benefits is usually based on loss of bodily members – a factor evaluated separately from a person's ability to work. Therefore, the evaluation of insanity or imbecility should not be based primarily on how a mental condition affects a person's working ability. Instead, it should consider the person's entire life. If the mental condition "affects the quality of the worker's personal, nonvocational life in significant activity comparably to the loss of two members or

sight of both eyes, and . . . it is unlikely that normal functioning can be restored," the worker is totally and permanently disabled as a result of incurable insanity or imbecility. *Id.* at 85.

The Plaintiff, Mr. Burnett, testified that he had evidence to prove that he was incurably insane. (T 13). Specifically, the Plaintiff testified that:

> Magistrate Purcell: That claim, as I understand it, has already been denied anyway. What about the mental disability, your Schizophrenia: when did that develop?
>
> Mr. Burnett: By 1992. That the doctor diagnosed me in November of 1992.
>
> Mr. Ognisanti: Judge –
>
> Magistrate Purcell: Sustained –
>
> Mr. Ognisanti: – once again, thank you; I was just going to have to place that objection that – that this man's self diagnosis is not credible.
>
> Mr. Burnett: It's on paper; I got proof.
>
> Magistrate Purcell: Well did you – you have to file certain notices that are called 42 Day Notices in order to submit medical records under the Rules. So, I'm going to deny you the right to file papers because you have to tell them you're going to do that ahead of time and give them notice to object to those papers or any reports –

Mr. Burnett: This is a what the doctor put down hisself to Social Security that this is his diagnosis to Social Security in November 1992.

Magistrate Purcell: Well you need medical testimony on that or you need to have the reports authenticated under Rule, what is it Five or Six?

Mr. Ognisanti: I think it's Rule Five Your Honor.

Magistrate Purcell: Under Rule Five of the Administrative Rules that deal with Workers Compensation Agency. There's rule for that –

Mr. Burnett: But you said this was about –

Magistrate Purcell: I'm sorry?

Mr. Burnett: – you said it was about mental; right?

Magistrate Purcell: Well that's part of your claim.

Mr. Burnett: You said when did mental happen; I'm telling you when mental happened.

Magistrate Purcell: Okay, but you can't tell me about what the doctor's say, so –

There is no material record to support Magistrate Purcell's decision that the Plaintiff-Appellant is not entitled to Total and Permanent Disability. In workers' compensation cases, findings of fact are conclusive before this Honorable Commission if

supported by competent evidence. *Holden v. Ford Motor Co.*, 439 Mich. 257 (1992). However, when applying this standard, it must be noted that the law sets forth that the Plaintiff-Appellant only need to prove his case by a preponderance of the evidence. *Aguilina v. General Motors Corp.*, 403 Mich. 206 (1978).

Magistrate Purcell's decision was not supported by competent, material, and substantial evidence based on the whole record as required under MCLA § 418.861(a), which provides:

> (3) Findings of fact made by a workers' compensation magistrate shall be considered conclusive by the commission if supported by competent, material, and substantial evidence on the whole record . . . 'substantial evidence' means such evidence, considering the whole record, as a reasonable mind will accept as adequate to justify the conclusion.
>
> (4) 'Whole record' means the entire record of the hearing, including all of the evidence in favor and all the evidence against a certain determination.

In this case, there was nothing on record that would have assisted the Magistrate in reaching a decision. In fact, Plaintiff-Appellant had documentation from his treating physicians and psychiatrist before the scheduled Trial Date. However, he lacked the legal background of presenting his evidence as required by law.

Two similar cases to this area *Al-Fatlawi vs. Employment Training and Designs Inc. and Legend Insurance Co.* 2001 ACO 380(2001); *Rogers vs UPS and Liberty Mutual Fire Insurance Co.* 2001 ACO 210 (2001). In both cases a medical report was not provided. In both cases, Magistrate denied the motions indicating that while things were perhaps not done perfectly and one could say negligently, they were not done willfully and the Motions were denied. In this case, the failure to produce medical evidence was not willful as the Plaintiff-Appellant was denied the opportunity to do so. Here, Magistrate Purcell prevented the Plaintiff from presenting his case by commencing trial with full knowledge of plaintiff's inability to neither represent himself nor present evidence.

REQUEST FOR RELIEF

Plaintiff-Appellant requests that this matter be remanded back to the Magistrate for a full and complete Hearing on the issues including the opportunity to present testimony of Plaintiff-Appellant and to submit the necessary documentation to support his claim of total and permanent disability.

Respectfully Submitted,

Date: 12/2/08 /s/ James O. Edokpolo
James O. Edokpolo
Attorney for Plaintiff-Appellant

C.A.N. Rao, M.D.
Psychiatrist
4600 Fashion Square Boulevard
Suite 200
Saginaw, MI 48604
Phone: 517.790.0095 Pager: [redacted]

To whom it is Concern

Mr. Carl Bennett is seen at this clinic since 10-16-91. Before that he used to see Dr Gardner another psychiatrist who is retired

Problems Pt has h/o of Schizophrenia for long time. He is taking Medicine including THORAZINE 50 mg QID He is disabled General Motors since 1981 because of his emotional problem

Pt is still has on going problem of paranoia and he is unable to work since 1981. He is permanently disabled. Pt feel he is taking disabled for life. He is seeing me once in 3 Months and taking Medicine as prescribed.

If you need further information call my office phone no. 989 790 0095

App. 71

[LOGO]

PMG

Preferred Medical Group, P.C.

Board Certified Family Medicine/Geriatric Medicine/
General Surgery/Physical Medicine/Cardiology
Members Beaumont Medical Staff

July 9, 2007

To Whom It May Concern:

I am writing in regards to my patient Carl Burnett, he has been a patient of mine for many reasons. Mr. Burnett was treated in 1988 for lumbar disc syndrome. At this point, he has continued complaints of back pain and numbness in both legs. Mr. Burnett walks with a cane. His most recent MRI of the lumbar spine from December 30, 1998 demonstrated degenerative disc disease at L4-5, facet hypertrophy at L5-S1 with spinal stenosis, facet hypertrophy on the right and the left at L4-5 with prominent ligamentum flavum, resulting in spinal stenosis, and L3-4 right sided foraminal stenosis. An EMG performed December 7, 1998 demonstrates bilateral L5-S1 radiculopathies which is consistent with spinal canal stenosis also.

At this time, Mr. Burnett is in continuous pain by his report. He requires a cane for stability while standing or walking. He does not have good use of either legs. There is no foreseeable improvement in this situation. The patient does not wish to undergo surgery in which is the only option for sustained improvement that I foresee at this time. Mr. Burnett has been

deemed permanently and totally disabled by Workmans Compensation since 1988.

If any other information is needed, please do not hesitate to contact my office.

Sincerely,

/s/ Alan Carbajo
Dr. Alan Carbajo, M.D.

Marc Weisman, DO, FFAP/Jason Talbert, MD/
Alan Carbajo, MD/Larry Lieberman, MD Michelle
Petropoulos, PA-C/Tara Caudill-Deaton, MD/
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